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THE USE OF FORMER TESTIMONY

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TESTIMONY BEFORE COMMITTING MAGISTRATE

The testimony delivered before a justice of the peace or other committing magistrate was usable in the later trial of the accused after the death of the witness, the accused having been represented by counsel and had full opportunity to cross-examine.[1] Although the act of May 23d, 1887, P. L. 159, allows the use of former testimony in a criminal case whenever it has been delivered in a proceeding conducted "in or before a court of record," and the defendant has been present and had an opportunity to examine or cross-examine, the right to use the testimony which has been given before the committing magistrate, who is not a court of record, still exists.[2]

FORMER TESTIMONY NOT RECEIVABLE

In assumpsit by two plaintiffs for goods sold, defendant offered evidence of what A (now dead) had sworn before a judge at chambers, on a motion to discharge him on common bail, in the presence of one of the plaintiffs. The evidence was properly excluded. Says Shippen, C. J., "Questions of bail before a judge in his chamber are not to be considered as trials in a court of record, wherein the testimony of witnesses at a former trial may be received as evidence in case of their death. The testimony before the judge must be regarded as on the same footing as a declaration *in pais* in the presence of the party. When the oppo-

[1]Brown v. Com., 73 Pa. 321; McLain v. Com., 99 Pa. 86.
[2]Com. v. Keck, 148 Pa. 639; Com. v. Lenousky, 206 Pa. 277.

site party agrees to the statement, it is an admission; so if he is silent, the maxim *qui tacet consentire videtur* applies. When he totally denies the statement, proof of it is not admissible at all.[1]

NOT RECEIVABLE—TESTIMONY BEFORE CORONER

The hearing before the coroner in a homicide case is not to ascertain the guilt of any particular person, but of any person whom the evidence may implicate. No cross-examination of witnesses is had. The coroner's discretion marks the line where the evidence of a witness shall begin and end. Hence, evidence developed before him may not only not be used in the trial of X for murder by the commonwealth, to affect the prisoner, but also not by the prisoner, to defeat a conviction. Chapter 13, § 5, of the statute of 1 and 2 Phil. and Mary requires the coroner in inquisitions finding murder or manslaughter to put in writing the effect of the material evidence given to the jury before him, and to certify and return the same with the inquisition. When so taken, certified and returned, the courts of England have held the evidence admissible on the later trial. But, when the witness is still living, though sick, the rule would not apply.[2]

KINDS OF ACTIONS IN WHICH TESTIMONY MAY BE USED

Former testimony may, when the proper conditions exist, be employed in any form of proceeding, e. g., in trespass, for the negligent killing of a father,[3] or for negligently causing personal injuries,[4] in assumpsit,[5] in ejectment,[6] in covenant for the price

[1]Jackson v. Winchester, 2 Y. 529.

[2]McLain v. Com., 99 Pa. 86. The statute did not apply in this case, also, because the evidence had not been taken down by the coroner or under his direction; nor was it returned with the inquisition. It was taken down by a short-hand writer at the instance of some undisclosed person.

[3]Delahunt v. T. & T. Co., 215 Pa. 241.

[4]Greenan v. Eggeling, 30 Super. 253; Becker v. Philadelphia, 217 Pa. 344; Giberson v. Patterson Mills Co., 187 Pa. 513; R. R. Co. v. Spearen, 47 Pa. 300; Molloy v. U. S. Express Co., 22 Super. 173.

[5]Pratt v. Patterson, 81 Pa. 114; Evans v. Reed, 78 Pa. 415; Wolf v. Wyeth, 11 S. & R. 149; Wright v. Cumpsty, 41 Pa. 102; Walbridge v. Knipper, 96 Pa. 48; Ins. Co. v. Johnson, 23 Pa. 72.

[6]Moore v. Pearson, 6 W. & S. 51; Rhine v. Robinson, 27 Pa. 30; Eckman v. Eckman, 68 Pa. 460; Hawk v. Greensweig, 7 Pa. L. J. 374; Beers v. Cornelius, 1 Pitts. 274; Covanhovan v. Hart, 21 Pa. 495.

of land,[1] in debt for work and labor done,[2] in trespass for mesne profits,[3] in trover and conversion of bonds of the United States,[4] in a feigned issue, in a proceeding to open a judgment,[5] or in an issue to determine testamentary capacity,[6] in trespass for a wrongful distress,[7] or for obstructing the use of water of a spring,[8] in a *sci fa* sur mechanics' lien,[9] in criminal prosecutions, e. g., for murder.[10]

EXPERT TESTIMONY PROVABLE

The testimony the repetition of whose use is sought may be of any sort, on any subject. It may be that of a witness as an expert;[11] that of a physician, e. g., as to the nature of the ailment of a party.[12] The testimony, e. g., concerning the sanity of a man, may have been delivered in a hypothetical case. Not every deviation of the evidence in the second case, from that assumed in the question, will render the evidence inadmissible. The former testimony is not made irrelevant by the fact simply that new and unexpected matters have been introduced at the second trial, upon which no cross-examination of the witness was conducted in the earlier trial. The former testimony is receivable, if the facts assumed in the hypothetical question might fairly be found to exist, by the jury at the second trial, without necessity to find other facts which would make the inferences of the witness palpably baseless.[13]

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[1]Jones v. Wood, 16 Pa. 25.

[2]Gould v. Crawford, 2 Pa. 89.

[3]Thornton v. Britton, 144 Pa. 126. Evidence on the subject of profits, taken in the trial of the previous ejectment.

[4]Rothrock v. Gallaher, 91 Pa. 108.

[5]Haupt v. Henninger, 37 Pa. 138.

[6]Com. Title Co. v. Gray, 150 Pa. 255.

[7]Perrin v. Wells, 155 Pa. 299.

[8]Knights of Pythias v. Leadbeter, 2 Super. 461.

[9]Ballman v. Heron, 169 Pa. 510.

[10]Brown v. Com., 73 Pa., 321; Com. v. Cleary, 148 Pa. 26; Com. v. Keck, 148 Pa. 639; Com. v. Lenousky, 206 Pa. 277. The defendant may use this former testimony, no less than the Commonwealth; McLain v. Com., 99 Pa. 86.

[11]Greenan v. Eggeling, 30 Super. 253.

[12]Becker v. Philadelphia, 217 Pa. 344.

[13]First Nat. Bank v. Wirebach, 106 Pa. 37

SIMILARITY OF THE EARLIER WITH THE LATER PROCEDURE

It is not necessary that the first and second proceedings should be similar in form, or have similar objects. It is enough if they are between the same parties, and if the subject-matter of the testimony in one is relevant to the other. Testimony in replevin may be used in a following assumpsit,[1] in ejectment in a following action of covenant,[2] in account render in a following assumpsit,[3] in a bill in equity in a following ejectment,[4] in assumpsit in a following distribution proceeding in the Orphans' Court.[5]

PROOF OF THE FORMER TESTIMONY

The former evidence may have been recently given. It may have been brief; have dealt with one or two subjects only, so that the remembrance of it by one who heard it is not impracticable. But whether recent and brief and simple, or not, any person who heard it, and will say that he remembers it, may prove its contents.[6] It is not necessary that the "very words" of the witness should be proved, as was assumed to be the case in England. To require proof of the words would, unless they had been reduced to writing at the time, exclude oral evidence altogether.[7] The memory being so frail, the truth of the statement of one who undertakes, after a lapse of a considerable time, to give the very words of the witness, may well be doubted.[8] The witness must be able to give the substance of all the testimony bearing upon the point in issue, not only of the testimony in chief, but of that on cross-examination. If he says he recollects

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[1] Wright v. Cumpsty, 41 Pa. 102.

[2] Jones v. Wood, 16 Pa. 25.

[3] Evans v. Reed, 78 Pa. 415.

[4] Land Co. v. Weidner, 169 Pa. 359.

[5] Dunlevy's Estate, 10 C. C. 454.

[6] Walbridge v. Knipper, 96 Pa. 48; Magill v. Kauffman, 4 S. & R. 317; Wolf v. Wyeth, 11 S. & R. 149. The witness testified that the absent witness had said that he had mailed an application for insurance within a day or two of the time it was made and directed it to the secretary of the fire insurance company. Ins. Co. v. Johnson, 23 Pa. 72.

[7] Wolf v. Wyeth, 11 S. & R. 149; Chess v. Chess, 17 S. & R. 409; Gould v. Crawford, 2 Pa. 89.

[8] Moore v. Pearson, 6 W. & S. 51; Cornell v. Green, 10 S. & R. 14.

that there was a cross-examination, but cannot remember what questions were put, but, if the questions put were repeated, he could likely recollect some of them, the evidence of the testimony should be wholly excluded. "If there was a cross-examination," says Duncan, J., "the witness should be prepared to state what that was, for the cross-examination might have explained what he swore to on the direct examination."[1] A put into writing what his evidence would be concerning the testimony of the deceased witness. He stated that the writing was all that he could recollect of what Mr. Hopkins said on his examination in chief. This required the rejection of the witness, because he was ready to give only the testimony on the direct examination.[2] In order to prove that a receipt was not signed by the person whose name was appended to it, a witness was called who testified that at the time of the alleged signing the person whose name was signed was at another place. He knew this because, being at that other place, he shod the horse of this person, who brought it to him. At a later trial a witness testifying to X's testimony, said that X had his day book open when he was giving his testimony. He could not say that X relied on the book, and not on his memory. He could not remember that X undertook to speak of any date independently of the book. This testimony concerning what X testified was properly received, although X's book was not produced.[3] It must not be overlooked that the act of May 23d, 1887, P. L. 158, seems to confine the mode of proving former evidence, which is to be used as evidence of the facts in issue, to "notes" (Sect. 3), "properly proven notes" (Sect. 9).

PROOF BY NOTES—NOTES OF COUNSEL

Independently of statute, notes of evidence, taken at the time of the delivery of it, by any one, could, when properly proved to be correct, be used to prove the content of the evidence. The notes were formerly taken by counsel or the judge. The notes may be in characters which the ordinary person cannot translate, or they may be otherwise unintelligible. Although they might be

[1] Watson v. Gilday, 11 S. & R. 337.

[2] Wolf v. Wyeth, 11 S. & R. 149.

[3] Cox v. Norton, 1 P. & W. 412. What X had said, says Huston, J., was to be proved, not why he said so; not the ground of his belief.

used to refresh the memory of the person who took them,[1] and although, his memory thus refreshed, he might testify to the former evidence, such notes themselves will be inadmissible. Notes consisting of abbreviations, short abstracts of sentences, prepositions, adverbs and conjunctions omitted, impersonal verbs much used, verbs without nominatives, nouns without verbs, and therefore of uncertain meaning, or totally unintelligible to strangers, must be excluded.[2] When the notes are intelligible and are sworn to be full and accurate, they may be received.[3] They do not need to contain the very words of the witness. It is not necessary that the counsel who proves the notes should, in order to justify the admission of them, have any recollection of the testimony. It is enough that he believes that the notes contain substantially all that the witness testified.[4]

NOTES OF THE TRIAL JUDGE

It was formerly, before the employment of court stenographers, the habit of judges to take notes of the testimony delivered in a cause. It was no part of their official duty,[5] however, to take these notes. They did not usually take down everything that the witness said. Generally they took down what of the testimony they deemed material, they condensed it, put it in their own language.[6] These notes therefore could not be put in evidence until the judge who took them swore to their complete-

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[1]In Lightner v. Wike, 4 S. & R. 203, Tilghman, C. J., seems to think that the notes could not be used as evidence, but merely to refresh the memory of the person who took them, a manifestly erroneous view. Notes were used in Jones v. Wood, 16 Pa. 25; R. R. Co. v. Spearen, 47 Pa. 300.

[2]Huidekoper v. Cotton, 3 W. 56.

[3]Moore v. Pearson, 6 W. & S. 51; R. R. Co. v. Spearen, 47 Pa. 300; Cornell v. Green, 10 S. & R. 14; Chess v. Chess, 17 S. & R. 409; Rhine v. Robinson, 27 Pa. 30; Jackson v. Ferris, 5 Sadler 302; Covanhoven v. Hart, 21 Pa. 495; Hocker v. Jamison, 2 W. & S. 438; Brown v. Com., 73 Pa. 321; Flanagin v. Leibert, Bright. N. P. 61; Towers v. Hagner, 3 Wh. 48; McAdams' Exec. v. Stilwell, 13 Pa. 90.

[4]Moore v. Pearson, 6 W. & S. 51; Rhine v. Robinson, 27 Pa. 30.

[5]Miles v. O'Hara, 4 Binn. 108; Livingston v. Cox, 8 W. & S. 61.

[6]Miles v. O'Hara, 4 Binn. 108. A copy of the notes was not receivable in evidence until explanation on oath of the non-production of the original.

ness and accuracy.[1] This proved, the notes would be independent evidence. Possibly the notes though not complete might be used by the judge to assist his memory, he thereby becoming able to detail the evidence.[2] The party to be adversely affected by the evidence might agree that the judge's notes of testimony should be put in, without his oath as to their fullness and accuracy,[3] and the notes without the oath could then be receivable.[4] The judge's death does not dispense with proof of the accuracy of his notes.

BILL OF EXCEPTIONS

Notes of testimony may be incorporated into the record by a bill of exceptions, but, even when thus incorporated, the record is evidence that the testimony was delivered, only for the purposes of review in the appellate court, not to prove in a later trial that the testimony was delivered.[5] Says Day, C. J., of the Ohio Supreme Court, quoted by Mestrez at J., "the bill of exceptions was taken under the statute for a specific purpose in that trial and imports verity no further than the statutory purpose for which it was authorized. It was never intended to be used as evidence in a subsequent trial of the case, of what was the testimony of the witnesses on the trial in which it was taken. Whenever it becomes competent to show, on a subsequent trial of the case, what testimony was given on a former trial, the usual modes of proof cannot be dispensed with by resort to the bill of exceptions taken for no such purpose."[6]

NOTES OF THE COURT STENOGRAPHER

If the notes of counsel or of the trial judge are a proper in-

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[1] 4 Binn. 108, Livingston v. Cox, 8 W. & S. 61.

[2] Leather v. Poultney, 4 Binn. 352.

[3] It was very common to do so, said Tilghman, C., J., in 1811; Miles v. O'Hara, 4 Binn. 108.

[4] Wright v. Cumpsty, 41 Pa. 102. The notes were of the judge who was presiding at the second trial.

[5] Livingston v. Cox, 8 W. & S. 61.

[6] Edwards v. Gimbel, 202 Pa. 30. The effort here was to show that the witness had previously given inconsistent evidence. In Parker v. Donaldson, 6 W. & S. 132, the record of the former trial was used to show that the witness was inconsistent with himself, but no objection was made. Cf. McDermott v. Hoffman, 70 Pa. 31, 52.

strument for proving the content of the former testimony, the verbatim notes of a stenographer, or the stenographer's translation therefrom, either in ordinary script or oral, are an eligible proof. Apparently, the stenographer must swear to the correctness of his notes and of his reading from or copy of them. Otherwise they are not the "properly proven notes of the examination," which the Act of May 23d, 1887, demands.[1] Possibly the notes without the suppletory oath of the stenographer will be received, when the party to be affected does not question their correctness.[2] The copy of his notes, which he files with the record, should be produced, but if it cannot be found, a carbon copy, proven by the stenographer to have been taken at the same time, may be used.[3] If no copy from the original notes has been made, the stenographer may read the original notes to the jury.[4]

NOTES OF CORONER

Testimony before a coroner may be desired to be used in a subsequent civil action, either as substantive evidence in the absence of the witness, or for the purpose of weakening the testimony delivered by the witness in that action, by showing its inconsistency with the earlier testimony. But the coroner's certified notes are not evidence of the testimony delivered before him, unless it appears that his inquest has found murder or manslaughter. If that does not appear, the coroner's oath as a witness, to the accuracy of his notes, would be necessary.[5]

TESTIMONY USED AS AN ADMISSION

The testimony of a witness in one proceeding may be used against him as an admission of the fact sworn to, in a later proceeding, in which he is a party.[6] Several persons are on trial for

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[1]Smith v. Hine, 179 Pa. 203. Cf. Molloy v. U. S. Express Co., 22 Super. 173; Com. v. Doughty, 139 Pa. 383. The stenographer was sworn in Brennan v. Jacobs, 1 Mona. 213; 22 W. N. 453.

[2]Giberson v. Patterson Mills Co., 187 Pa. 513. Notes of testimony were used in Pratt v. Patterson, 81 Pa. 114; Com. v. Cleary, 148 Pa. 26; Dunlevy's Estate, 10 C. C. 454; Poundstone v. Jones, 182 Pa. 574.

[3]Molloy v. U. S. Express Co., 22 Super. 173.

[4]Knights of Pythias v. Leadbeter, 2 Super. 461; Smith v. Hine, 179 Pa. 203.

[5]Edwards v. Gimbel, 202 Pa. 30.

[6]Anderson v. Snyder, 14 Super. 424.

conspiracy. Three of them have testified in a previous case. The commonwealth may prove this testimony as in the nature of an admission. Says Paxson, J., "Their admissions or declarations would be evidence against them, to show their share in a conspiracy; and, if so, why not their testimony under oath?"[1] The testimony of the defendant in one trial may be used against him in a subsequent trial upon the same indictment even if he elects not to become a witness at that trial.[2] Testimony given under the act of July 12th, 1842, which abolishes imprisonment for debt, may not, says the 22nd section of that act, be used in any "other suit or prosecution," e. g., in a subsequent ejectment.[3]

WHEN WITNESS IS PRESENT AND COMPETENT

Ordinarily, when the person who formerly testified is present at the later trial,[4] or his presence could have been secured,[5] and he is competent, the former testimony cannot be used as substantive evidence of the matters averred in it. Notes of the testimony of witnesses taken by an examiner. In a subsequent settlement of the account of the executor of an estate, in the Orphan's Court of Philadelphia, these notes were not receivable, instead of the testimony newly given, of the witnesses who were still living and within the court's jurisdiction.[6] If the opposite party excludes a witness on the incorrect ground that he is incompetent by something that has occurred since he delivered his testimony in the earlier proceeding, he will be estopped from objecting in the Supreme Court, to the admission of the former testimony on the ground that the witness was in fact competent.[7] If the witness is not present, and the plaintiff uses his deposition,

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[1]Com. v. Doughty, 139 Pa. 383.

[2]Com. v. House, 6 Super. 92. The voluntary testimony of the defendant called by the plaintiff is receivable to affect him; Miller v. McCool, 3 Kulp, 317.

[3]Uhler v. Maulfair, 23 Pa. 481.

[4]Merriman v. McManus, 102 Pa. 102.

[5]Richardson v. Stewart, 2 S. & R. 83. The witness living, and "for anything that appeared within the jurisdiction of the court," Tilghman, C. J., says he should have been brought into court "or his deposition should have been taken."

[6]Lafferty's Estate, 184 Pa. 502; Huidekoper v. Cotton, 3 W. 56.

[7]Merriman v. McManus, 102 Pa. 102.

the defendant may employ his former testimony, not merely to contradict him, but to prove facts not touched upon in the deposition.[1]

USE OF NOTES TO REFRESH RECOLLECTION OF WITNESS

In Rothrock v. Gallaher,[2] a witness 87 years old, whose memory had failed him, was allowed to hear his testimony on a former occasion read to him, and then to say that, although he had forgotten that he had so testified, if he did so testify, the testimony was true. In a later case, a witness 68 years old, being asked concerning the condition of buildings on the premises in dispute at a former time, said he did not remember the time when a certain addition was put to the log house. He did remember that he had testified as to the matter in a former proceeding before arbitrators. Counsel then offered to read to him what he had said on that occasion, first authenticating the notes of evidence. Justifying the exclusion of this offer, Gordon, J., says, the principle of Rothrock v. Gallaher cannot be extended to the case of a witness of ordinary health and memory. There was no evidence that the witness had, in the interval[3] between the arbitration and trial, by old age or otherwise, lost his memory. "He but failed to recollect what he had previously sworn to, but, if this were enough to admit the notes of a former trial, we might as well abandon original testimony altogether and supply it with previous notes and depositions. It would certainly be an excellent way to avoid the contradiction of a doubtful witness, for he could always be thus led to the exact words of his former evidence."[4]

[1]Parker v. Donaldson, 6 W. & S. 132.

[2]91 Pa. 108.

[3]The length of this interval does not appear.

[4]Velott v. Lewis, 102 Pa. 326. Cf. Smith v. Summerhill, 21 York 132, where the suggestion is made that if the first testimony was delivered very shortly after the event, notes of it might be used when the second testimony was delivered long after the event. Cf. also, Putnam v. United States, 162 U. S. 687. Before arbitrators a witness testified as to articles destroyed by a fire. Counsel for defendant (a fire insurance company) took down the list of the articles. At the trial, before the jury, the company called this witness, and he stated that he had given an account of the things lost in the fire before the arbitrators; that he had spoken from recollection. The court refused properly to allow the defendant to ask whether the list made by counsel was a correct statement of the items of loss mentioned by him in his testimony before the arbitrators. (a) The question was not permissible for the purpose of discrediting the witness of the defendant. No attempt was made to use the list as a memorandum to refresh the witness' recollection. (b) The paper could not have been received in evidence even if the witness had said that it was correct. Ins. Co. v. Updegraff, 43 Pa. 350.

SHOWING PREVIOUS INCONSISTENT CLAIM

It is proper to show that the present claim of a plaintiff is inconsistent with a past claim, by showing what witnesses for him testified in the earlier case. A sues the city of Philadelphia for personal injuries; a uterine disturbance caused by an accident. Defendant attempts to show that this disturbance was due to a former accident, for the injuries suffered from which she had sued. A physician had testified for her, that she was suffering from uterine trouble, caused by the accident, and A had recovered a verdict based on this testimony. The testimony of this physician can be shown to contradict the present claim of the plaintiff that the uterine disorder was due to the late accident.[1]

CONTRADICTION OF A WITNESS BY FORMER TESTIMONY

The force of the testimony of a witness is weakened by showing that he has made statements inconsistent with those which he is making as a witness. These statements may have been made on the street without any solemnity,[2] or they may have been made carefully and under circumstances which appeal strongly to the duty to tell the truth. They may have been made as a witness in a preceding trial or investigation. The object of showing these former declarations may be not merely to reveal complete and explicit contradiction, but also to show that on the former trial, when, had he believed that a certain thing had been said or done, he would probably have mentioned it, he did not mention it.[3] The action was for negligence or want of skill of a physician. A witness for the plaintiff testified that the physician, the defendant, changed the position of the plaintiff's broken leg about six weeks after it had been set. It was proved that the witness, on a former trial, had testified to the physician's neglect, but had said nothing about the changing of the position of the leg.[4] A witness saying that from his knowledge of tobacco, the

[1]Becker v. Philadelphia, 217 Pa. 345.

[2]If the hand writing of a deceased subscribing witness of a will is proved as a tacit declaration by him that the testator was sane, it may be shown that he has declared that the testator was insane when he made the will. Harden v. Hays, 9 Pa. 151.

[3]Bemus v. Howard, 3 W. 255; McAteer v. McMullen, 2 Pa. 324.

[4]Id.

plaintiff's tobacco was "not quite" merchantable, his testimony at a former trial was competent, to lessen the force of his present testimony by showing that he did not have a clear view as to what is merchantable tobacco.[1]

WHERE FORMER TESTIMONY DELIVERED

It matters little in what proceeding the former testimony was delivered. It may have occurred in a former jury trial of the same action,[2] in an investigation before a coroner,[3] in a proceeding in equity, the present testimony being given in an action at law,[4] in a trial before arbitrators,[5] in the probate of a will before the register; the evidence being used in the trial of a feigned issue to determine the validity of the will,[6] in an ejectment, turning on the testamentary capacity of the maker of a will, the witness affirming this capacity, but in the later ejectment denying it,[7] in a prosecution for larceny, the evidence being used in a later action for false imprisonment,[8] in an inquiry by an examiner appointed by the Orphan's Court to determine whether an issue *devisavit vel non* should be awarded. His notes of testimony may be used in the trial of the issue.[9]

CONTRADICTION MUST BE PERMISSIBLE

When evidence is improperly brought out in cross-examination, not being germane to the cause, and being elicited for the purpose of contradicting it by former testimony, the contradiction by the former testimony, or otherwise, is not allowable.[10]

HOW PROVE THE CONTRADICTORY EVIDENCE

The witness may be cross-examined as to his having given,

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[1]Field v. Schuster, 26 Super. 82.

[2]Field v. Schuster, 26 Super. 82; Parker v. Donaldson, 6 W. & S. 132.

[3]Edwards v. Gimbel, 202 Pa. 30.

[4]Rudy v. Myton, 19 Super. 312.

[5]Wilhelm v. Cornell, 3 Gr. 178; Smith v. Price, 8 W. 447.

[6]Cowden v. Reynolds, 12 S. & R. 281. At the trial the witness said the testator was too intoxicated to make a will. Before the register he had said that the testator was of sound mind.

[7]Harden v. Hays, 9 Pa. 151.

[8]Butler v. Stockdale, 19 Super. 98.

[9]Stokes v. Miller, 10 W. N. 241.

[10]Com. v. Scouton, 20 Super. 503.

on a former occasion, contradictory testimony,[1] or made contradictory declarations. If he admits delivering the testimony, his inconsistency is revealed. If he does not, proof by witnesses who heard him testify of what he said may be given,[2] and notes of the testimony may be used[3] as when the object is to use it, not for contradiction, but as substantive evidence. The notes of the trial judge, properly proved, may be used,[4] but they must be proved by him or another[5] to be accurate, nor does his death dispense with this proof.[6] The act of May 23, 1887, P. L. 158, makes a distinction between the former testimony which is used as independent evidence and that which is used for contradiction, requiring the former to be proved by properly proven notes, and permitting the latter to be "orally proved." The notes cannot be proved by the fact that they are embraced in a bill of exceptions, sealed by the trial judge,[7] nor are the notes of a coroner made evidence by his certificate, when the inquest has not resulted in a finding of murder or manslaughter.[8]

WHOLE EVIDENCE TO BE GIVEN

When a part of the evidence previously given is offered to lessen the credit of a witness, the party who is interested in supporting his credit may put in evidence the entire testimony respecting the subject concerning which the discrepancy is alleged to exist. "The effect of a witness's testimony is to be gathered from all that he says, and it would be unjust to subject a witness to

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[1]Harden v. Hays, 9 Pa. 151; Bank of Northern Liberties v. Davis, 6 W. & S. 285.

[2]Harden v. Hays, 9 Pa. 151; Foster v. Shaw, 7 S. & R. 156; Bemus v. Howard, 3 W. 255. The register swore to testimony delivered before him, in Cowden v. Reynolds, 12 S. & R. 281.

[3]Wilhelm v. Cornell, 3 Gr. 178. The stenographer's notes were used in Butler v. Stockdale, 19 Super. 98. In Com. v. Scouton, 20 Super. 503, the notes of the stenographer, filed in the case, were produced with his official certificate, he not being present, nor swearing to their accuracy. The trial court admitted them. The superior court thought the proof of contradiction, in whatever mode, was not admissible.

[4]Schall v. Miller, 5 Wh. 156.

[5]Livingston v. Cox, 8 W. & S. 61.

[6]Foster v. Shaw, 7 S. & R. 156.

[7]Parker v. Donaldson, 6 W. & S. 132.

[8]Com. v. Scouton, 20 Super. 503.

suspicion," says, Porter (W. D.), J., "by showing a part of what he had said on a former occasion and excluding the explanation which he then gave."[1] The plaintiff having, in order to discredit a witness for the defendant, read from the notes of evidence taken before arbitrators, a part of the cross-examination, the defendant may read other portions of the witness's testimony given upon his re-examination.[2] But, the giving of evidence of that part of the former testimony, which contradicts the present testimony, is no warrant for the party who is offering the witness to produce to the jury all the former testimony, even that part of it in respect to which no contradiction is alleged.[3]

WHEN WITNESS IS NOT A PARTY

The rule was formerly laid down that a witness could not be contradicted by proof of his own previous inconsistent statements, unless he were first questioned about such statements, in order that he might deny or admit the making of them, or explain them consistently with his present testimony.[4] The principle now recognized is that whether the witness shall be thus given an opportunity to deny or explain the imputed inconsistent statement must be left to the sound discretion of the trial judge. Unless the discretion is abused, there is no ground for reversal.[5] When the witness testifies by deposition taken before the trial and at a distance, the party to be affected adversely by his testimony may not be aware, when it is delivered, of the inconsistent statements. He will be allowed to prove these, therefore, at the trial, although he did not question the deposing witness concerning them.[6] A witness is found under examination at the trial to be mentally incompetent. His deposition previously taken is then admitted. The opposite party may show statements made by him since the taking of the deposition, inconsistent therewith, although he has

[1] Rudy v. Myton, 19 Super. 312.

[2] Wilhelm v. Cornell, 3 Gr. 178.

[3] Stokes v. Miller, 10 W. N. 241.

[4] McAteer v. McMullen, 2 Pa. 32; Wertz v. May, 21 Pa. 274; Wright v. Cumpsty, 41 Pa. 102.

[5] Rothrock v. Gallaher, 91 Pa. 108; Shannon v. Castner, 21 Super. 294. Yet the rule is spoken of as "well settled" in Brubaker v. Taylor, 76 Pa. 83.

[6] Rothrock v. Gallaher, 91 Pa. 108; Walden v. Finch, 70 Pa. 460.

not been questioned concerning them. He could not have been asked concerning them at the taking of the deposition, for they had not then been made. He could not be asked concerning them at the trial, for he is then *non compes mentis*.[1] If the court refuses to continue a case, because of the absence of a material witness for the defendant, when the plaintiff admits that, if present, the witness would swear as the defendant alleges that he would, the plaintiff may prove contradictory statements made by the absent witness, although he has not been questioned concerning them.[2]

USE OF STENOGRAPHIC NOTES TO CONTRADICT

In Butler v. Stockdale,[3] a trial for assault and battery and false imprisonment, the stenographer's notes of the evidence of a witness in a former trial were read to contradict him. The notes were not shown to him, nor read to him; his attention to the manner in which he had testified was called only in a "general way." No error was committed in receiving the former testimony. Beaver, J., observes that the witnesses were asked on cross-examination in a general way about their former testimony. Their attention was called to particular parts of that testimony relating to specific facts. They were not shown the notes; were not particularly interrogated as to the answers to specific questions. The defendant did not request that this should be done. It was proper to contradict their testimony as to particular facts by reading so much of the stenographer's notes as contradicted the testimony in chief.

USE OF THE CONTRADICTION

The former testimony of a witness cannot be used, the wit-

[1]Shannon v. Castner, 21 Super. 294. The witness' leaving the court house without permission during the trial would justify allowing proof in his absence of his prior contradictory statements.

[2]Baldi v. Ins. Co., 18 Super. 599. The rule requiring that an opportunity be given to the witness to explain or deny the contradiction, is said by Rice, P. J., to be based largely on a regard for the witness himself. But he should not be spared at the cost of the interest of the party. Justice to the witness dictates the rule. Bank of Northern Liberties v. Davis, 6 W. & S. 285. Plaintiff having used the deposition of a witness, defendant may show that he contradicted himself in his testimony in an earlier trial. Parker v. Donaldson, 6 W. & S. 132.

[3]19 Super. 98.

ness being present and testifying, as "independent proof."[1] It simply exposes the inconsistency of the witness and so reduces the credit which may be attached to his present testimony. When the witness is a party, proof of his self-contradiction has this function, it is true, but his prior statements are in the nature of admissions,[2] and they are "evidence of themselves."[3]

WHEN THE WITNESS IS A PARTY

When a party becomes a witness, it is not necessary, as a preliminary to the exposure of his prior declarations, under oath or not, which are inconsistent with his present testimony, to call his attention to these earlier declarations.[4] The reasons assigned for the distinction between party and non-party is not entirely satisfactory. If the proof of the contradictory statement of the party not only lessens his credit as a witness, but acts as substantive evidence against him, the reason for apprising him of the intention to prove the statement, and for giving him a chance to deny or explain, is weightier than if the result would be merely to weaken his testimony. If, as some cases suggest, the object of the notice is to protect the witness from humiliation, and the disparagement of his credit in the community, the party deserves as much consideration of this sort as the mere witness. A reason for making the distinction might be that the party is under a duty to remain throughout the trial and the witness not, and the witness may therefore have left the court house without suspecting that an effort would be made to assail his consistency. At all events, notice should be given to a witness before he leaves that an effort will be made to show that he has contradicted himself.

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[1] Cowden v. Reynolds, 12 S. & R. 281; Smith v. Price, 8 W. 447.

[2] Kreiter v. Bomberger, 82 Pa. 79.

[3] Brubaker v. Taylor, 76 Pa. 83.

[4] Brubaker v. Taylor, 76 Pa. 83; Kreiter v. Bomberger, 82 Pa. 59. Cf. Butler v. Stockdale, 19 Super. 98; Cronkrite v. Trexler, 187 Pa. 100.

MOOT COURT

WILLIAM HOLBEIN v. R. R. CO. AND A, B, C, ETC., STOCKHOLDERS

Corporations—Statute of Limitations

STATEMENT OF FACTS

A subscribed for 20 shares of the stock of the defendant company. He paid 10% of its par, which was $100 per share. The rest was to be paid on call of the directors. Four calls were made, and A paid the amounts called. Two years elapsed, when the corporation being insolvent, made an assignment for the benefit of creditors, June 17, 1906. Holbein is a creditor. He unites with the assignee in a bill, filed July 7, 1912, to compel the stockholders to pay so much of their unpaid stock subscriptions, payment of which would enable the creditor to be paid in full.

Miller for Plaintiff.

Myers for Defendant.

OPINION OF THE COURT

PEPPETS, J.—The preliminary question is as to the jurisdiction in equity. That this is a proper case for equitable jurisdiction is well settled and needs no discussion. Cook v. Carpenter, 212 Pa. 165; Gray v. Citizens Gas Co., 206 Pa. 303; Newton's Estate, 46 Super. 40.

The remaining question, the substantial issue in the case, concerns the statute of limitations. A court of equity in a suit to enforce payment of a subscription to the capital stock of a corporation, acts out of analogy to the statute of limitations. Railway v. Graham, 36 Pa. 77; Swearingen v. Dairy Co., 198 Pa. 68; Cook v. Carpenter, 212 Pa. 165; Newton's Estate, 46 Pa., Super. 40.

The statute begins to run from the time the right of action accrues. When did plaintiff's right of action accrue in this case? If corporation had been solvent and doing business in the ordinary way, the statute would not begin to run until call had been made (according to terms of subscription); but the company became insolvent and made an assignment for the benefit of creditors. Is this equivalent to a call and does it set the statute running?. If so, the assignment being made June 17, 1906, and the action begun July 7, 1912, more than six years elapsed and the action is barred.

An early case upon this subject is Franklin Savings Bank v. Bridges, 20 W. N. C. 43. Syllabus of that case is that six years is a bar to an action by a corporation on a subscription when no call or assessment has been made in that time. But there the corporation had been

insolvent for more than six years, and the decision was put explicitly on that ground which is now well settled.

The above case was expressly followed in Swearingen v. Sewickley Dairy Co., *Supra.* That was a bill in equity by creditors against a corporation and its stockholders to enforce payment of an alleged balance due on stock subscriptions. Company became insolvent and made an assignment for the benefit of creditors on Jan. 5, 1891, and bill was filed June 30, 1899. The Court, thru Justice Mitchell, held that the bill was too late. "The right of action of the plaintiff, whatever it was, accrued upon the fact of insolvency of the dairy company shown by the assignment for the benefit of creditors, and statute of limitations began to run from that date."

Cook v. Carpenter, *Supra.*, was a similar action to recover unpaid subscriptions. In this case a period greater than six years elapsed between time when last call was made and the present action for the balance of the subscription. But only two years had passed since the corporation became insolvent and made the assignment. The Court held that the action was not barred by the statute of limitations because the right to make calls for payment of subscriptions could not be barred by the statute, saying, "The duty of payment is only a reserve duty for possible contingencies, and until they happen, either by calls by the corporation on the subscription, or *by the rights of creditors*, there is no duty of the subscribers to pay, no right of action against him for non-payment and no starting point for the statute." The opinion discussed the doctrine of Swearingen v. Dairy Co., Supra., and affirmed it, but distinguished the facts of the case then decided.

Counsel for the plaintiff argues that until the corporate indebtedness is ascertained and proportionate amount due from each stockholder to pay that indebtedness is known, no cause of action accrues, and the statute of limitations does not begin to run, and that liability of the stockholders in this case is not definite and ascertained. He cites Schofield v. Turner, 213 Pa. 548. That case was a suit by a receiver of a mutual insurance association against a member for payment of an assessment. The Court held that the statute of limitations began to run against his liability to pay assessments from the date of decree of the Court authorizing the assessment and not from the date of insolvency of the company.

But the Court in deciding the case expressly distinguished it from Swearingen v. Dairy Co., *Supra.* It said, "There is a difference between the liability of a member of a mutual insurance company and the holder of capital stock in a corporation on his unpaid subscription. The stockholder during solvency of a corporation can be called upon at any time by the board of directors to pay the balance due on his stock. *His liability is fixed and definite and enforceable upon insolvency.* While a member of the mutual insurance association makes no unconditional promise to pay, but only such sum or sums as may be assessed against him as his portion required for the necessities or losses of his company."

So that Swearingen v. Dairy Co. controls in which Justice Mitchell said, "So long as the corporation is solvent, the whole subscription is due in accordance with its terms and is payable when and as called for by the corporation. But when the corporation becomes insolvent, the contract between it and the subscriber is terminated and his debt to it then is only for such part of his subscription as is required to pay the corporate debts. It is a debt not to it in its own right, but in the right of its creditors. But it would seem that the status of the stockholders, as holder of the fund, at least contingently to the creditors, must be fixed at the time and by the fact of the ascertainment of insolvency. It is a general rule that insolvency fixes the relative rights of all the parties concerned. From that moment the unpaid subscription become part of the assets for payment of the creditors. It is true they are special or as they may be called reserved assets not to be put in distribution until the insufficiency of the other assets is shown, but this is no reason why the creditors may not proceed at once to show the fact."

It is our opinion that when the railroad company admitted its insolvency and executed a deed of assignment for the benefit of its creditors, every stockholder knew that the balance of his unpaid subscription—a fixed sum—might be needed for the payment of the company's debts, and the assignee and creditors knew that the balance was due. With the liability thus fixed and the right to enforce it established, the statute of limitations began to run from the time of insolvency.

Therefore, Halbein was guilty of laches and his right of action barred by the lapse of over six years. The bill is hereby dismissed at the costs of the complainant.

OPINION OF SUPERIOR COURT

It was originally held in Pennsylvania that where a subscriber promised to pay for stock upon call, the statute of limitations did not begin to run until the call was made. Sinkler v. Co., 3 P. & W. 149.

Later, however, it was held that where the corporation did not make calls until after six years from the date of subscription, an action for the amount of such calls was barred. This holding was at first based upon a presumption, "by analogy to the statute of limitations," that after six years without calls the enterprise was abandoned, but, in course of time, the "presumption by analogy" was discarded and the statute of limitations was held to apply directly. R. R. Co. v. Byers, 32 Pa. 22; McCully v. R. R., 32 Pa. 25; R. R. v. Graham, 36 Pa. 77.

In a later case it was said that "these decisions have not commanded uniform assent, and it must be confessed that they are not easy to reconcile with the cases that hold that a call is not a necessary foundation for a suit against a stockholder." Swearingen v. Dairy Co., 198 Pa. 68.

Finally, the cases thus criticised were overruled by the Supreme Court, which held that the statute did not begin to run until a call was

made and that it was not necessary that such call should be made within six years from the date of subscription. Cook v. Carpenter, 212 Pa. 165.

Previous to the decision in Cook v. Carpenter it had been decided that an action against a stockholder of an *insolvent* corporation for an unpaid stock subscription must be brought within six years after the insolvency of the corporation. Swearingen v. Dairy Co., 198 Pa. 68, and in a case decided after the decision in Cook v. Carpenter this doctrine was approved and followed. Newton's Est., 46 Super. 40.

These cases are determinative of the present case, unless, as contended by the counsel for the plaintiffs, the doctrine enunciated therein is applicable only where the payment of the whole of the unpaid subscriptions is necessary to liquidate the indebtness of the company.

We have discovered nothing in either of the cases which give color for such a contention, and that such a qualification was not intended is clearly indicated in Schofield v. Turner, 213 Pa. 548, where the Court, speaking of Swearingen v. Dairy Co., said, "When the company admitted its insolvency and executed a deed of assignment for the benefit of creditors, every stockholder knew that the balance of his subscription—a fixed sum—*might* be needed and the assignee knew that the balance was due. With the liability thus fixed and the right to enforce it thus established, the statute began to run from the time of insolvency."

Furthermore, in Swearingen v. Dairy Co., the Court said, "All the cases say that on a creditor's bill an account must be taken of the debts, assets and unpaid subscriptions in order to determine *how much* of the latter should be called," and "the right of action of the plaintiff [assignee], *whatever it was*, accrued upon the fact of insolvency and the statute of limitations began to run from that date.

Affirmed.

ARTHUR GRANT v. JAMES CHENEY

Specific Performance—Option Contract

STATEMENT OF FACTS

Cheney owned a rare coin. In consideration of fifty cents paid to him by Grant he gave the latter an option to purchase the coin for $35 within 30 days. Later Cheney notified Grant that he revoked his offer. Grant immediately and within the thirty days tendered the $35 to Cheney, who refused to deliver the coin. Grant files this bill in equity to compel Cheney to sell him the coin.

McCall for Plaintiff.

Rickles for Defendant.

OPINION OF THE COURT

MYERS, J.—The act of June 16, 1836, P. L. 784 (amended by act Feb. 14, 1857) provides, "The several courts of Common Pleas shall have

the jurisdiction and powers of a court of Chancery, so far as relates to affording of specific relief when a recovery in damages would be an inadequate remedy."

If this contract had been simply a contract for the sale of a rare or unique coin it would have been enforceable under the provisions of the statute, *supra*. For a recovery in damages clearly would be an inadequate remedy. Many cases are to be found directly in point, viz., Ralsten v. Ilmsen, 204 Pa. 588; Beasley v. Allyn (wooden bowl, trophy), 15 Phila. 97; McGovern v. Remington (surveyor's maps), 12 Pa. 56; Schraff v. Walter (key to safe deposit box), 61 N. J. Eq. 476; Somerset v. Cookson (alter-piece), 3 Pr. Wms. 390; Dowling v. Betjemann (picture), 2 J. & H. 544.

But this was an option contract. An option has been defined as "a promise to keep an offer open for a specified time." Clark on Contracts, p 33. It was suggested on argument that the contract to keep open the offer, tho binding upon the promiser, was, like most contracts, capable of being broken by the promiser and leaving to the promisee his remedy at law for damages for the breach. If the contract to keep the offer open could be and was broken the offer must have been withdrawn thereby. And the plaintiff, not having accepted the offer before its withdrawal, there is no contract here for the sale of the coin. Hence this suit for specific performance must be dismissed.

We admit the logic of this argument, but hesitate to adopt it. The rule stated by many text-writers and in the cases is thus laid down in Clark on Contracts, p 33, "If the promise to keep the offer open for a specified time is supported by a valid consideration—as where money is paid or promised for the option or refusal—the promise constitutes a contract in itself, and, of course, is binding. A failure to keep the offer open would be a breach of contract, for which an action for damages would lie, or, upon acceptance, a suit for specific performance." In 9 Cyc. 287, this question has been discussed thus: "It has been suggested that there can be no meeting of minds by an acceptance after the offer has been withdrawn and the revocation communicated to the offeree; that there can therefore be no contract of sale which can be enforced, but, that the offerer is simply liable in damages for the breach of his agreement to keep the offer open. But the correct view would seem to be that where the offer is made under seal or is founded on a consideration, it has become more than an offer; it has become a promise upon condition. And a promise cannot be revoked without the consent of the promisee. Altho the latter may not perform the condition of accepting within the time limited, yet if he does, he is entitled to demand performance." In Bishop on Contracts, Sec. 325, we read: "If a consideration for the undertaking to leave the offer open is given and accepted, this constitutes of itself a contract, and the offer can not be withdrawn."

In O'Brien v. Boland, 166 Mass. 481, and in Mansfield v. Hodgdon, 147 Mass. 304, an option for the sale of land under eal was held to be

irrevocable and acceptance by the offeree to be unaffected by previous attempted withdrawals of the offer. In the former case the Court said, "In the present case, because the offer was under seal, it was an irrevocable covenant, conditional upon acceptance within ten days, and the written acceptance within that time made it a mutual contract which the plaintiff can enforce. Plaintiff was not bound to assent to the withdrawal of the offer and could treat the withdrawal as inoperative. The withdrawal, if itself a breach, was only one step toward the situation which would enable the plaintiff to ask for specific performance in a court of equity." Here there is a simple contract having a *valid consideration.* In the cases cited the contract was *under seal.*

At common law any offer under seal is irrevocable. The Courts treat it as a "conditional covenant." Mansfield v. Hodgdon, 147 Mass. 307. If an option under seal to sell is a covenant to sell upon condition, by the same reasoning an option upon a valid consideration, but not under seal, is a conditional contract to sell, and that condition is fulfilled by acceptance by the offeree in either case.

But it is not only on account of the weight of the authorities that we decide that specific performance of this contract should be enforced. We believe that it would be contrary to all the principles of justice and fair-dealing, for the enforcement of which courts of equity exist, to allow this defendant to keep this coin. If there is no adequate remedy in damages for a failure to perform a contract to sell the coin, then, clearly there is no adequate remedy in damages for his failure to allow the plaintiff to exercise his right to buy. In neither case can the plaintiff procure another coin like that which the defendant promised to sell to him.

The case of Douglas v. Halstead, 216 Pa. 292, seems to accord with this view. There it was held that the rights of the holder of a "top-option"—that is to say, an option which is to operate only in case the holder of a prior option or contract for the sale of land fails to take it —are subordinate to the rights of the latter, hence, the latter is entitled to maintain ejectment on his contract if the land is conveyed to the former in violation of his rights.

In view of the injustice that inevitably would result from the adoption of the contention of the defendant—logical tho it seem—we willingly accept the rule as asserted by the text-writers and in the cases that an option, if founded upon a valuable consideration, like an option under seal, is irrevocable and that an attempted revocation has no effect upon the rights of the promisee in law or in equity.

Decree prayed for granted.

OPINION OF SUPERIOR COURT

It is generally held that when, for a consideration, a right is given to purchase property within a certain time, if the promisee chooses, and the person holding the option exercises it within the time and in the manner specified, a valid contract is made, altho the person giving the

option may have attempted to revoke it before acceptance. Brantley on Contracts, 329.

The authorities frequently speak of such a transaction as constituting an irrevocable offer. Many of the cases which declare that an option given for a valuable consideration amounts to an irrevocable offer do so in obiters, as in such cases the offer was either accepted before revocation or was not accepted until after the offer had lapsed by efflux of time. This statement, however, is contrary to the legal conception of an offer. There cannot be an irrevocable offer, because an offer is simply the declaration of his will by one partly alone and, tho the person who makes the offer agrees to keep it open this simply amounts to a statement on his part that he will remain of the state of mind, and even should he contract to do so, it would not follow that he might not change his mind and terminate the offer. In such case he would break his contract, but this is possible for him because a contract incapable of being broken is a legal impossibility. Ashely on Contracts, Sec. 13. Langdell on Contracts, Sec. 178.

The option is not an offer of any sort, but is a unilateral contract. "When my offer is, that if you pay me a certain sum you shall have the right to purchase the property in the future if you choose and you accept this offer by paying the sum, a unilateral contract is formed upon an executed consideration." Brantley on Contracts, 329. In return for the consideration, the promisee has received a promise upon condition. When he performs that condition by exercising his option, he is entitled to enforce the promise, and if damages at law would in the particular case be inadequate, he is entitled to specify performance. Page v. Martin, 46 N. J. C. 593; Zimmerman v. Brown (N. J.), 75 Atl. 676, 9 Cyc. 287.

Even if the option is regarded as a mere contract to continue an offer, the obstacles in the way of specific performance are not insuperable. To grant specific performance in such case, equity would have to compel the parties to make a contract, and when it is thus made, compel the defendant to perform, and the plaintiff in his bill would have to pray the specific performance of a contract not yet in existence. Equity might, however, overcome these difficulties. In cases of a promise to leave real property by will, equity compels the person taking the property, whether by devise or inheritance, to convey to promisee. The difficulty of compelling a living person to make a contract is no greater than that of compelling a dead person to make a will, and if in the latter case, tho specific performance of such an agreement is impossible, equity will do what is equivalent to specific performance, in order that the "remedy may not be defeated by a device inconsistent with the agreement," there is no good reason why equity should allow the remedy in the former case to be defeated "by any device inconsistent with the agreement." See Ashley on Contracts, Sec. 13. "Of the cases in which an attempted revocation was made before the expiration of the time fixed by the offer, many are cases in which specific performance would

have been given had the offer been accepted before revocation. In cases of this sort, if the offer is to remain open a fixed time and is on a valuable consideration, equity ignores the attempted revocation, and treats a subsequent acceptance exactly as if no attempted revocation had been made; that is, it gives specific performance whenever that remedy would have been given had such attempted revocation not been made." Page on Contracts, Sec. 35. See especially Watts v. Kellar, 56 Fed. 1.

Judgment affirmed.

NATIONAL BANK v. JONES

Negotiable Instrument—Holder in Due Course—Contract to Compound a Felony—Act May 16, 1901

IN ASSUMPSIT

STATEMENT OF FACTS

Jno. Jones, son of the defendant and employed by one Trimmer, stole certain articles from Trimmer, who threatens to prosecute him for larceny unless the value of the things stolen is paid him. The defendant, a widow, executed a note for $3000.00, the estimated value of the things stolen, payable to Trimmer or his order. Trimmer had the note immediately discounted at plaintiff's bank. The defense to the action on the note is that it was made without consideration and that it was made to compound a felony.

Watkins for Plaintiff.

Sharp for Defendant.

OPINION OF THE COURT

SHOECRAFT, J.—The question involved in this case can be decided entirely under the Negotiable Instruments, Act of May 16, 1901:

A bill is negotiated in two ways, if payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder completed by delivery.

A holder is prima facie considered as having taken same for value. "The title of a person who negotiates an instrument is defective when he obtained the instrument by fraud, duress or for an illegal consideration"——but "a holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon." S. Purdon, 3275; Vol. 3, 5358 P. & L. As between the bank and Jones this note was certainly valid, "for a note, though founded on an illegal

and immoral consideration, is valid in the hands of a holder in due course." S. Purdon, 3275, Vol. 3. A holder in "due course" is a holder who has taken the instrument under the following conditions:

(1) "That it is complete and regular upon its face. (2) That he became the holder of it before it was overdue and without notice that it had previously been dishonored, if such was the fact. (3) That he took it in good faith and for value. (4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." P. & L. 5573, Vol. 3. Under this definition of a holder, in due course, the bank thus became one when it received the note from Trimmer.

A note executed with the object of stifling a criminal prosecution for a felony or misdemeanor is void, as between the original parties. Riddle v. Hall, 99 Pa. 116. But when this note comes into the hands of a holder in due course, the title is cleared, as in Henry v. State Bank & Laurens, 107 Ia., N. W. 1034, where a note was given to settle a prosecution for embezzlement, it was held enforceable in the hands of an innocent holder.

A note given in consequence of an agreement not to prosecute the maker's son for forgery is void in hands of payee, National Bank v. Kirk, 90 Pa. 49; and a note given in a stock gambling transaction is void to payee, Northern National Bank v. Arnold, 187 Pa. 356, but in Albertson v. Laughlin et al., 173 Pa. 525, a case similar in principle to the two just preceding, the judge quotes Lord Mansfield, who said, "A holder coming fairly by a note has nothing to do with the transaction as between the original parties."

In view of the foregoing authorities, judgment must be entered for plaintiff.

OPINION OF SUPERIOR COURT

A note given to compound a felony is valid in the hands of a bona fide purchaser for value before maturity. American Bank v. Madison, 144 Ky. 152; 137 L. W. 1076, 8 Cyc. 45; Meadow v. Bird, 22 Ga. 246.

Even if the bank is not a holder, in due course, the note is enforceable, because it was enforceable in the hands of Trimmer. Where the defense is that a contract should be avoided on the ground that it was made to compound a felony, it must be shown that there was an agreement not to prosecute. In this case there was no agreement not to prosecute. Threats of a prosecution, unless a certain security is given, will not justify an inference that if the security is given the agreement is that no prosecution will follow. Swope v. Ins. Co., 93 Pa. 251; Hamilton v. Lockhart, 158 Pa. 452.

Judgment affirmed.

COBLEIGH v. NEWELL

Conversion—Intent—Tender of the Chattel

ACTION OF CONVERSION

STATEMENT OF FACTS

Newell contracted to haul Cobleigh's horse to Philadelphia by rail. He violated his contract and hauled it by water. Cobleigh refused to accept the horse and sues for conversion.

Hollister for Plaintiff.

Kountz for Defendant.

OPINION OF THE COURT

RICKLES, J.—Conversion is any distinct act of dominion exerted over another's personal property, in denial of, or inconsistent with, his rights therein. Aylesbury Mercantile Co. v. Fitch, 23 L. R. A. 573; Story on Bailments; Pollock on Torts.

A constructive conversion takes place, when a person does such acts in reference to the goods or personal chattels of another as to amount in view of the law to an appropriation to himself. A direct conversion takes place, when a person actually appropriates the property of another to himself, or his own beneficial use and enjoyment, or to that of a third person, or destroys it or alters its nature. A manual taking is not necessary.

With the above observations as to conversion, we will proceed to see if Newell did, by his transporting the horse by water rather than by rail, commit such a conversion as a court of law will hold him guilty of.

The first question to observe is, was there such a dominion over the property as to be inconsistent with, or a denial of the rights of the plaintiff over the property. The manner of his obtaining possession of the horse was by contract, therefore his possession would not constitute a conversion, for he was rightfully in possession.

Are we then to consider every unauthorized use by a bailee, "and that is what Newell was," of his bailor's property a conversion. It is generally held by most courts of the Union that it is a conversion. In Lucas v. Trumball, 15 Gray 307, the court instructed the jury that if the hiring of a horse was to go to a certain point and the hirer drove a greater distance beyond that point, that it amounted to a conversion, and that the hirer was liable for all damages subsequently occurring, and proof that the accident arose from the fault of the horse would not exonerate the hirer. It will be observed that in this case no injury was inflicted on the horse.

In Wheelock v. Wheelright, 5 Mass. 109, it was decided that the hirer, by riding the horse beyond the place for which he had contracted to go, was answerable to the owner in trover. In this case, as in almost every other case holding this doctrine, there was an injury to the horse or other property that had been misused. Hall v. Carcaran, 107 Mass. 251; Roth v. Hawes, 12 Pick. 136; Woodman v. Hubbard, 25 M. H. 67; Pellam v. Coeney, 117 Mass. 102; Welch v. Mohr, 93 Cal. 371, all stand for the principle that driving beyond the place to which the hirer contracted to go, amounts to a conversion of the horse. In all of these cases the horse was injured. The basis of the conversion not being whether or not the defendant received any advantage from the misuser, but that the plaintiff was injured thereby. A wrongful intention is not an essential element of the conversion, and it is sufficient if it appears that the owner has been deprived of his property, or its condition has been altered by the defendant's unauthorized act in assuming dominion and control of the property. Boyce v. Brockway, 31 N. Y. 490; Laverty v. Wathem, 68 N. Y. 522; Industrial and General Trust Co. v. Pod, 170 N. Y. 233.

There has evidently been a tender of the horse in this case from the fact that it has not been accepted by the plaintiff, he treating this as converted property. This he had a right to do. If the property was converted, the tender would not relieve Newell from liability for conversion.

Having satisfied ourselves that the fact of his not having the intent, or the fact of his having tendered the horse, does not exempt him from liability for conversion. The remaining question is, did the manner of shipping the horse amount to such a dominion over the horse as to amount to a denial of the owner's right, or inconsistent with the same? Was the horse altered? Was there such a delay, by reason of the transportation by water, as to bring the horse into the market at such a time that he would bring less than had he been shipped by rail and arrived in the market sooner.

Had any of the above conditions appeared, he would clearly have been liable for the loss sustained in some cases, and in others for the absolute conversion. But the only fact that appears is the bold allegation that he was shipped by a different method than that agreed upon.

It is in my opinion, with great justice, Judge Cooley says, in the case of Blitz v. Union Steam Boat Co., 51 Mich. 558, a case very similar to this, that the shippers bargained for the more desirable method of transportation, and possibly agreed to pay a higher rate for it, but inasmuch as the carrier used the other mode of transportation, and the shipper alleges not one iota of injury in any manner or form whatever, it would be the height of injustice to hold him liable for conversion.

In Doolittle v. Shaw, 92 Iowa 348, and reported in 26 L. R. A. 366, quoting from Story on Bailments, it was said this question is still deemed to be open to controversy. It must be borne in mind that in al-

most every case where the strict rule has been applied, the defendant has been guilty of negligence or wilful misconduct, or he has injured or destroyed the property. The fact of shipping by water does not of itself imply an assertion of ownership, or title, or dominion over the horse, inconsistent with the plaintiff's title or property in the horse. The trend of modernism is to disregard little technicalities and render decisions as the justice of the case demands. We consequently render judgment for defendant.

OPINION OF SUPERIOR COURT

We quite agree with the observation of Baron Bramwell that, "after all, no one can undertake to define what a conversion is." Burroughs v. Bayne, 5 H. & N. 296. The same learned judge has remarked that most of the confusion which exists on the subject can be traced to two sources. One is the use by the courts and text writers of such equivocal and indefinite phrases as "act of dominion," "exercise of control," etc.; the other is the tendency of the courts to allow trover in cases where the amount of damages would be the same if trespass or case were brought, because of the total loss of the chattel.

Originally, when it was said that the defendant had converted a chattel, what was meant was that the defendant intended to receive and did receive the full benefit of the chattel, thereby necessarily intending to deprive and depriving the plaintiff permanently of all his rights in it.

At present it is wholly unnecessary either that the defendant receive or intend to receive any benefit, or that the plaintiff be deprived of his right in the property, or that the defendant intend to deprive the plaintiff of his rights in it.

Trover has, therefore, generally been allowed for misfeasances by a bailee without any reference to this element of intent. It will be noticed, however, that in most of these cases the property was accidentally destroyed during such wrongful use, or became a total loss later as the result of such use, and therefore if the plaintiff had sued in case he would have recovered the same amount of damages.

In several cases it has been held that a mere misfeasance by a bailee does not constitute a conversion. Harvey v. Epes, 12 Grat. 153; Shaw v. Doolittle, 92 Ia. 348; 26 L. R. A. 366, and it has been remarked that "this rule seems to do substantial justice." Hale on Bailments, 195. The rights of the bailor are sufficiently protected if the defendant is held liable as an insurer during such wrongful use and for the delay or loss, if any, caused thereby. It is not necessary to compel the defendant to buy the chattel at a price fixed by a jury.

Judgment affirmed.

WM. PERRIN'S ESTATE

Wills—Revocation—Republication—Evidence

STATEMENT OF FACTS

Perrin made a will, having three months prior thereto written one which he still preserved. He subsequently revoked the second will by cutting out his signature, and he declared to a friend who was present that he would write another will next week, or, if not, his first will should stand. He died, not having written another. The first will is offered for probate.

Hoch for Plaintiff.

Rickles for Defendant.

OPINION OF THE COURT

DUGHI, J.—The questions involved in this case are: 1. Was the act of the testator in cutting out his name sufficient to revoke the second will? 2. If so, was the first will revived thereby without any further act of the testator?

Under the Wills act of Pa., enacted April 8, 1833, there are two ways in which wills executed according to the required forms of law can be revoked. One of these modes is by another will, or codicil, or other writing declaring a repeal. This is a revocation by another and distinct instrument in writing. But to enable the will, codicil or other writing to have such an effect, it must itself be complete and executed in the prescribed manner, namely, as a will.

The other method to repeal is by something done to the will itself, something more than intention expressed. It must be an intention to annul carried into execution by acts done to the paper. This mode is described in the statute as "burning, cancelling or obliterating or destroying same" by the testator.

The 13th sec. of the statute provides that "no will in writing concerning any real estate shall be repealed, nor shall any devise or direction therein be altered otherwise than by some other will or codicil in writing, or other writing declaring the same, executed and proved, in the same manner as is hereinbefore provided, or by burning, cancelling or obliterating or destroying the same by the testator himself or by some one in his presence and by his express direction."

The act doesn't declare what shall amount to a cancellation, etc. The words are not technical ones, and therefore the Legislature must be presumed to have used them in their ordinary and commonly understood sense; and thus used, they secure the object the Legislature had in view, i. e., a complete manifestation of an executed intention to repeal.

If a document should be entirely burned, obliterated or torn to bits, there would be no doubt as to the intention of the testator. But it has been held unnecessary to go to that extent in any of the modes in order to satisfy the requirements of the statute; the slightest degree of either

mode, provided it appears that the act was done animo revocandi, is effectual as a revocation. 40 Cyc. 1190.

The burning, tearing or otherwise destroying a will must be done with the intention to revoke it. It is not the mere manual operation of destroying a will which will satisfy the requirement of the law, the act must be accompanied with the intention to revoke in order to constitute a legal revocation. 40 Cyc. 1187; Hise v. Hise, 31 Pa. 246; Rudy v. Ulrich, 69 Pa. 177; Emernecker's Appeal, 218 Pa. 369; Evan's Appeal, 58 Pa. 238. This last case further holds that a will may be cancelled by an act done to the will which stamps on it an intention that it shall have no effect, though the act be not a complete obliteration or physical destruction.

The tearing or cutting out of the signature of the testator revokes the whole will, at least when no contrary intention appears. Gay v. Gay, 60 Iowa 415; Sanders v. Babbitt, 106 Ky. 646; in re-Kirkpatrick, 227 N. J. Eq. 463; Townsend v. Howard, 86 Me. 285; Baptist Church v. Robbarts, 2 Pa. 110.

In this case, the testator deliberately cut out his signature, and that he intended to revoke the first will is very clearly shown from his remark to the person present that he would write another will, but if he did not, the first was to stand. That the second will was revoked, we think, has been established beyond the peradventure of a doubt. The mere act of cutting out his name, true, could not be called a destroying or obliterating the will, but according to the great weight of authority, as we have already shown, a complete destruction of a will is not necessary for its cancellation. All there need be is an intention to revoke, coupled with an act, however slight, which manifests that intention.

As to the second principle involved in the case, we think it is a well settled rule in most of the States of the Union, that a revocation of a will revoking a prior will, establishes the will first executed, provided, however, the first will still fulfils the requirements of the law.

All wills are in their nature inchoate until the death of the testator, at which time the instrument becomes operative. The second will executed by Perrin was but an inchoate intention and by a wilful and deliberate act on his part, it became as if it had never existed. The prior will being preserved in its entirety by the testator, and so far as appears without a flaw, it became the will which would be consummated at his death, unless prior to that time, he manifested a change in his intention according to the prescribed rules of law. Lord Mansfield, in Goodright v. Glazier, 4 Burr 2514 (found in 10 Pa. 82), says: "A will is ambulatory until the death of the testator. If a testator does not let it stand till his death, it isn't his will."

In this case, Perrin had two wills, and having cancelled the second, and not having written another to replace it, the first one remained which was never cancelled, and so it stands as his will.

Chief Justice McKean, in Lawson v. Morrison, 2 Dall. 286, says: "The destruction of a will which repealed or superseded a previous one, leaves the first as if the second had not existed. Jarman in his work on

Wills in 5th ed., vol. 1, page 294, and the 6th ed., vol. 1, page 120, says: "Where an act of cancellation without making another will, so as to fairly raise an inference that the testator meant the revocation of the old will to depend on the efficacy of the new disposition intended to be substituted, such will be the legal effect of the transaction; and therefore, if the will intended to be substituted is inoperative from defect of attestation or any other cause, the revocation fails also, and the original will remains in force." This is called "the doctrine of dependent relative revocation."

In Rudy v. Ulrich, 69 Pa. 177, it was held that a will may be revoked by implication or directly, and that a cancellation of a second will which revoked a former will, by implication, establishes the first will in full force. In Flintham v. Bradford, 10 Pa. 80, it was held that the cancellation of a posterior will does of itself revive and restore a prior will preserved by the testator.

As to admissibility of the statement of the testator in evidence to show his intention of what should become of the first will, it is a well settled rule that where it is shown that the testator has destroyed or otherwise cancelled his will, the declarations made by him at that time are admissible as part of the resgestae to show with what intent he destroyed the instrument. 3 Wigmore, 1782; Evan's Appeal, 58 Pa. 238; Pickens v. Davis, 134 Mass. 252; Waterman v. Whitney, 11 N. Y. 157. In 108 Pa., page 82, Chief Justice Mercur says: 'It is well settled that under the act of 1705, that a will might be republished by parol so as to pass not only real estate which the testator owned not only at the time of the making of the will, but also that which he afterwards acquired.'" Jack v. Shoenberger, 10 Harris 416. This case holds, as Campbell v. Jamison, 8 Barr 497, expressly did—that the act of 1833 didn't expressly prohibit a will to be republished by parol.

It would appear, therefore, from the foregoing, to be well established that the act of cancellation, deliberately and intentionally performed, of a posterior will does of itself revive and restore a prior will preserved by the testator.

Decreed that the will be admitted to probate.

OPINION OF SUPREME COURT

It is not to be doubted that the testator's cutting out his signature to a will is expressive of the intention that it shall no longer stand as a will, and is an effectual revocation.

This will, so revoked, had been preceded by another, which the testator had preserved not only down to the execution, but down to the cancellation, of the second, and down to his death. It does not appear that the second will expressly revoked the first. Being, however, inconsistent with the first, it revoked the first by implication.

When a former will is thus revoked by a later, the revocation of the later is regarded as a revival *ipso facto* of the former, if still preserved, or rather as evidence of the intention that the former shall again be-

come the will of the testator, to which intention, thus inferred, and not otherwise proved, effect will be given. Flintham v. Bradford, 10 Pa. 82; Lausen v. Morrison, 2 Dall. 286; Stephenson's Estate, 6 C. C. 628.

But it is quite possible that the testator has no intention to revive the earlier will by the abrogation of the later. The scheme of disposal of property in neither may longer satisfy him. He may prefer and intend to allow effect to that of the intestate law. He may intend to write a third will, which will agree neither with either of the two prior wills, nor with the arrangements of the intestate law. The testator may declare in some way that he has no intention, in repealing his latest will, to revive any earlier. His intention, thus revealed, will be respected by the courts. They will decline to consider the earlier will as reinstated.

Have we here any sufficient indication that the testator intended not to revive the first will? He observed to a friend, when he cut his signature from the first will, that "he would write another will next week, or if not, that his first will should stand." This, we think, may be properly understood to mean that the first will should stand unless and until another will should be executed. The intention to die intestate was negatived. The first will was to operate unless a third will superseded it.

The words used by the testatrix in Manning's Appeal, 46 Super. 607, differ from those by the testator in the case before us. The testatrix caused the later of two wills to be burnt, saying, according to one version, that "she was going to have a new will made." This revealed the purpose, at that time, that the first will should not operate. Subsequently she delivered the first will to her husband, saying "that is my will, you take care of it," etc. This, treated as a subsequent republication, was regarded as not sufficiently proved, because not proved by two witnesses. The fact that it was proved by parol evidence was not an objection. Forquer's Estate, 216 Pa. 331.

In Kerschner's Estate, 41 Super. 112, a testatrix who had made two wills burnt the second, declaring that "the other last will shall count." The court *tacitly* assumes that the validity of the first will depended on the declaration of the testator's intention. The writer of the opinion concludes that the parol evidence of republication was sufficient to sustain the will as a republished one. How many witnesses proved the testatrix's declaration does not appear.

Flintham v. Bradford, *supra*, concerned itself, as Beaver, J., points out in Kerschner's Estate, *supra*, with a will which was written before the Wills act of 1833. We discover nothing in that act, however, which changes the law with respect to republication.

We think that the learned court below has sufficiently discussed the doctrines which are applicable to the solution of the question before it, and therefore the

Appeal is dismissed.